EXHIBIT D

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

POLICE & FIRE RETIREMENT SYSTEM OF THE CITY OF DETROIT,

Plaintiff,

v

WALMART INC.,

Defendant.

C. A. No. 2020-0478-JTL

NORFOLK COUNTY RETIREMENT SYSTEM,

Plaintiff,

v

WALMART INC.,

Defendant.

C. A. No. 2020-0482-JTL

captions cont'd ...

- - -

Chancery Court Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Monday, October 5, 2020
1:30 p.m.

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BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor

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SECTION 220 TRIAL AND RULINGS OF THE COURT HELD VIA VIDEO CONFERENCE

... caption cont'd

THE ONTARIO PROVINCIAL COUNCIL OF CARPENTERS' PENSION TRUST FUND,	:	
Plaintiff,	:	
v	:	C. A. No.
	:	2020-0697-JTL
WALMART INC.,	:	
Defendant.	:	

APPEARANCES: (via Zoom)

GREGORY V. VARALLO, ESQ.
Bernstein, Litowitz, Berger & Grossmann LLP
-and-
MARK LEBOVITCH, ESQ.
DAVID WALES, ESQ.
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NED C. WEINBERGER, ESQ.
MARK RICHARDSON, ESQ.
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DAVID MacISAAC, ESQ.
of the New York Bar
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APPEARANCES: (via Zoom) (cont'd)

RAYMOND J. DiCAMILLO, ESQ.
JOHN M. O'TOOLE, ESQ.
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THE COURT: Welcome, everyone. Thank you for being here. What I would like to do is the following: First of all, if we can do some quick introductions and identify the people who will be doing the speaking. If you're not going to have a speaking role, it would be great if at that point you could turn off your video, not because it's not wonderful to see you, but because, as everyone knows, you can turn off video participants as I do -- nonvideo participants as I do, and so it helps reduce the clutter on the Zoom screen.

Then, in terms of conducting the hearing, I'm interested to hear from counsel's view on this, but it seemed to me from looking through your slides that one of you wants to tell me a lot about proper purpose; one of you doesn't really want to talk very much about proper purpose except to tell me how big Walmart is and to point out that this stuff really probably wasn't a major part of this far-flung, worldwide shopping empire.

I think that it would be helpful if we all got on the same page on proper purpose before we turn to scope. So my suggestion is that we spend -- we're going to break in an hour because I've already

been on Zoom all day, and I'm probably not going to be able to go for an hour without a break. We're going to break at the one-hour mark for ten minutes.

I suggest we use that first hour to talk about purpose. If we need all of it, we can use it; if we don't, we don't have to. And imagine that you-all have 30 minutes each. And then I can give you my views on purpose. Because unless I hear something quite remarkable, you-all have done a good job of covering the waterfront on that, I think. And then we can turn to scope.

So I've now talked a little bit. Before what I said I wanted to start was with introductions. So I think, Mr. Varallo, that's probably your cue.

MR. VARALLO: Thank you, Your Honor.

Pleasure to appear before you. Greg Varallo from Bernstein Litowitz on behalf of Police & Fire Retirement System of the City of Detroit and as local counsel for Norfolk County Retirement System. From Bernstein Litowitz today with me, Your Honor, are David Wales who, with Your Honor's permission, will make the principal presentation for the plaintiffs. And after Mr. Wales has completed his presentation,

Mr. MacIsaac from the Labaton Sucharow firm will make an additional presentation.

By way of further introductions, my colleagues Alla Zayenchik, Dan Meyer, and Mark Lebovitch are with us today. Also from -- on behalf of Norfolk County Retirement System, Nathaniel Orenstein and Dalton Rodriguez. And from Labaton Sucharow on behalf of The Ontario Provincial Council of Carpenters' Pension Trust Fund, Ned Weinberger, Mark Richardson, and David MacIsaac.

THE COURT: Great, thank you.

Mr. DiCamillo, do you want to do similar honors?

MR. DiCAMILLO: Yes, Your Honor. Thank you.

Here with us this afternoon from my firm is John O'Toole. From Latham & Watkins we have Sean Berkowitz, Nick Siciliano, Whitney Weber, and Renatta Gorski. And from Walmart's legal department, Ross Higman.

THE COURT: Who's going to be doing the speaking principally for your side, Mr. DiCamillo?

MR. DiCAMILLO: It will be me and Mr. Berkowitz, Your Honor.

THE COURT: Great.

MR. BERKOWITZ: Good afternoon.

THE COURT: Thank you. All right.

Well, Mr. Wales, why don't you go ahead. As I said, I'd like to first focus on purpose, come to some type of shared understanding -- or at least share my understanding, it may not cohere with your-all's understanding, but we'll see. And then, move on and have a continued discussion.

So, Mr. Wales, please proceed.

MR. WALES: Thank you, Your Honor. Good afternoon. Thank you for the opportunity to be heard today.

I just want to very briefly start out with what's not in dispute. And what's not in dispute is that the plaintiffs are stockholders, they made the 220 demands, that they've owned the stock from 2009 or 2011, respectively, and Walmart stated in their pretrial brief they're not making a form or matter defense.

Putting aside the disclosure claims, Walmart's entire challenge to proper purpose is two pages. We really do need to go through that, number one, to establish our proper purpose, but also it

shows the ties to senior management and the board and it helps inform the scope of the documents that should be ordered.

I just have to change view. I just lost Your Honor when slides went up. One second, please. Sorry about that. Okay.

So, obviously, this matter arises in the context of the opioid crisis our country is facing. And the government has declared the opioid crisis a public health emergency. That's Exhibit 283. And, according to the CDC, more than 230,000 Americans have died from overdose of prescription drugs. That's Exhibit 219.

While that is the context, our focus today is much more limited. It's whether there is a credible basis to investigate Walmart's board and senior executives for failing to implement and maintain controls related to suspicious orders of opioids and whether they failed to exercise oversight.

Now, the federal regulations place a legal obligation on all parties in the chain of distribution of opioids. Those legal obligations are set out in the Controlled Substances Act and in DEA regulations, and that's in paragraph 4 of our pretrial

order, stipulated facts, as well as in Slide 4.

Similarly, a distributor of controlled substances must design and operate its system to identify suspicious orders and report those to the DEA. That's also paragraph 4 of the pretrial order.

For our purposes, Walmart was involved in two parts of the chains of distributions of opioids. First, until 2018, Walmart or its subsidiaries were distributors of opioids to its own pharmacies; and, second, Walmart or its subsidiaries operated approximately 4,700 pharmacies, and many of them distributed opioids. That's pretrial 2 as well as some other exhibits, like JX 60.

Now, I'm going to try to present the credible basis story chronologically, even though it unfolded at different times, with a lot of it coming out in 2019 and 2020.

As Your Honor is aware, there's an opioid MDL in Ohio, and we're well aware of that from *Amerisource*, and it's in our papers. And these claims arise out of the alleged illegal distribution of opioids by Walmart and many others. And that's discussed at pretrial order paragraph 9 and Walmart's 10-K, which is Exhibit 115, as well as numerous state

actions by states, other government entities in the state court. That's also Exhibit 115.

The MDL was created in December 2017, and the evidence and rulings from that became public primarily in 2019 and 2020. Now, they're up to -- they've already had summary judgment in the MDL. They had a bellwether trial scheduled, and there's more to come.

Now, Exhibit 194, which is in pretrial order 10 -- at paragraph 10, is the MDL ruling denying summary judgment on the civil conspiracy counts against both the distributor and pharmacy defendants. And Walmart is a distributor and pharmacy defendant in both of those.

Now, Exhibit 213 is the MDL ruling denying Walmart's summary judgment motion on public nuance and civil conspiracy for alleged failure to maintain controls against diversion of opioids. This decision from the MDL court summarizes some of the evidence presented against Walmart. This decision is paragraph 11 of the PTO.

Now, what I want to do, because this is an important document for us, because it does start establishing timeline and how long this problem

continued, is to turn to that exhibit, 213.

Now on page 2, there's a Section called "Failure to Maintain Effective Controls." And it says here the Court had denied summary judgment to Walmart. It says, "Walmart asserts Plaintiffs cannot show it failed to maintain effective controls against diversion ... Plaintiffs respond with evidence suggesting, *inter alia*, the following facts. From the early 2000s to April 2018, Walmart self-distributed controlled substances to its own pharmacies. Before 2011, Walmart had no written policies or procedures concerning the monitoring of suspicious orders. During this time frame, it relied on employees to look at daily orders and, 'based on their knowledge,' let someone know if 'they saw something that maybe looked like it was kind of high.' The identity of these employees changed over time, as people left and ... hired. In determining whether they saw unusual patterns or orders, the employees relied on their own knowledge and experience; Walmart did not provide written information to guide them."

So -- and that is our Slide 5. But there you have a court indicating there's evidence that -- evidence to support that, or at least

sufficient evidence to have a jury -- let the jury make that determination.

Now, moving forward from the 2011 time period and later, there is other -- there's other evidence. Some of the other evidence is that Walmart pharmacies received letters of admonition from the DEA for failing to comply with their legal obligations related to the dispensing of opioids. Walmart admits that in their answer. That's Exhibit 248 at 8980 that Walmart pharmacies received such letters of admonition. And the ProPublica article, which is Exhibit 221, says more than 50 received such letters.

Now, what happened is -- and moving on -- in 2009, the DEA issued an order to show cause to a Walmart pharmacy in California for failing to comply with the requirements for distributing opioids. That's pretrial order paragraph 6. And the order itself is Exhibit 9, and that's also discussed a pretrial order 7 and 8. The results of that order to show cause and the subsequent DEA investigation is that Walmart entered into a memorandum of agreement with the DEA in 2011. So that's two years after the order to show cause.

And this memorandum agreement covered

all current and future Walmart pharmacies, not just the one but the thousands that they have around the country. And it lasted with a four-year term.

Now, JX 9, the memorandum of agreement, specifically provides that on paragraph 4(a), "Walmart agrees to maintain a compliance program, updated as necessary, designed to detect and prevent diversion of controlled substances as required by the Controlled Substances Act ... and applicable DEA regulations." That's discussed on 6 and 7 -- Slide 6 and 7.

I saw, obviously in Walmart's slide, some comments about that. And I guess what I'll have to say is if you have an order to show cause for one of 4,700 pharmacies, you have a problem with one pharmacy, you replace a bad apple. You don't enter into a nationwide agreement covering all 4,700 the last four years. That's indicative that the investigation found much more and more widespread problems.

And the MOU is at Slide 7. Now, there are also a number of reasons to believe that the senior executives and the board must have known about this memorandum of understanding. First, the nature

of the obligation. You don't obligate all 4,700 pharmacies around the country to undertake something without approval at the highest level, number one.

Number two, the subject matter of the settlement, it's a legal obligation dealing with public health and safety. And if they violate it, the consequences could be serious. There could be civil fines. There could be penalties. They could lose their license. There could even be criminal prosecution.

Finally, and I think kind of the most important one, is the Walmart audit committee charter itself. I would refer Your Honor to Exhibit 227. And that is Slide 8 of our presentation. And there, it makes clear that the audit committee has an obligation to "advise the Board with respect to, the Company's policies, processes ... procedures regarding compliance with applicable laws and regulations ...."

They have to oversee management to assure compliance by the Company with applicable regulatory -- legal and regulatory requirements. They discuss with management and advise the board with respect to the company's policies and procedures regarding compliance with applicable laws and

language, and they meet with the chief legal officer.

Similarly, at the bottom of Slide 8, we have a proxy from the time that has the same type of reporting obligations discussed. So there's every reason to believe that the board knew. And if they didn't, it was a reporting failure, which itself is a separate basis for potential liability.

Now, moving forward in time to the 2011-2015 time period, there's evidence that Walmart continued to fail to comply with the legal requirements. And I'm turning back now to the summary judgment motion decision, which is Exhibit 213, and I am on the third page.

And at the top of the third page the Court that is denying summary judgment notes, "From 2011 to 2015, Walmart implemented a threshold system that flagged ... orders exceeding 5,000 dos[es] ... orders that were 30 percent higher than a rolling four-week average for a particular item." And I note, "It is unclear what, if any, due diligence was performed on flagged orders; it appears ... Walmart simply shipped the flagged orders and did not report them to the DEA." That's hardly consistent with their regulatory obligations. And that is Slide 9.

But continuing into the next slide and continuing into the opinion, it says, "Beginning in ... 2012, Walmart implemented 'hard limits' of 20 bottles for shipments of Oxycodone ... and 50 bottles of other opioid[s] ...."

And "Jeff Abernathy, a Walmart employee who was responsible for reporting to the DEA if there was a suspicious order identified on his shift, testified that, for orders exceeding the threshold limits, he was directed to reduce the order to the threshold limit and ship it anyway. As to any orders that were cut, Walmart's pharmacies remained free to order the same ... products from other distributors such as McKesson and AmerisourceBergen."

So -- and we've also attached some of the testimony of Mr. Abernathy, which is Exhibit 144, to show the support for these facts.

Now, it continued. In 2013, there's a risk -- there's a controlled substance risk assessment, and that's Exhibit 177. This is a Walmart document obtained from the MDL files. And if you turn to the third page of that, this is from 2013, it says, "Suspicious Order Identification, Monitoring, and Reporting. Design & operate a [system] to detect

suspicious orders and report to the DEA when discovered." And delivery status to be determined. The next line, "Maximum order limits. Establish additional maximum order limits of highly abused drugs." To be determined.

So here we are, four years after the order to show cause, two years after their agreement with the DEA, and they don't have this. This is what they're supposed to do.

If you continue on the next page, it's this "Suspicious Order ... Monitoring, and Reporting Timeline." The boxes are blank. And then you go to the next page, at the timeline for the maximum order, the boxes are blank. You go a few pages later in this, and they're talking about pharmacy timeline for setting up certain closed circuit TVs, and it says to "Meet [our] Obligations [under the] DEA MOA." So here they knew they had these obligations and they weren't doing it.

Now, I want to turn to the next document, which is Exhibit 180. This is a powerful document, Your Honor. This is from 2014, and, again, it was produced -- it was obtained from the court files in the MDL. And it says "Portfolio Scoring

Worksheet, Suspicious Order Monitoring." And here, I'm on the page that ends with 649. And you go down the middle of the page it says, "Is the risk being mitigated today by manual, systematic, or a combination of both ..." and then it says "5." And what does 5 mean? "No, Emerging Risk ... has no processes in place today."

Next box down: "What is the likelihood that the events or conditions underlying the Risk will occur?" "Likely."

Next box down: "What is the potential financial or reputational impact to the company if [these] events ... occur?" "Severe."

Turning to the next page: "What is the extent of the Legal or Regulatory requirement?" "National.

"Is [this] effort related to a settlement [or] agreement with a Government Agency ...." "Yes."

"Is this effort Executive directed?" "Yes."

"Is this effort Board directed or informed?" "Board informed."

So here we are, in 2014, five years

after the order to show cause, three years after their settlement and, in their own words, there's no system in place.

Now, turning to Slide 15, it summarizes some of the evidence that we've presented. Some of the evidence is from the ProPublica article. And you have a quote from Mr. Nelson. He's a gentleman that the U.S. Attorney's Office subsequently wanted to indict. He's like, you know, I'm not concerned about refusals to fill, I'm more concerned about driving sales.

You have testimony from Ms. Hiland, which is Exhibit 148, "didn't make sense for ... business" purposes to have a more rigorous system.

And then the summary judgment opinion back in Exhibit 213, which is probably one of the most powerful pieces of evidence. With respect to the Walmart suspicious order monitoring, "the Court notes the record evidence suggests obvious deficiencies that a layperson could plainly recognize."

So -- and it continues. Exhibit 176. 176, again, is another internal Walmart document from -- obtained from the MDL. It's from 2015. And they're frankly concerned about a DEA enforcement

action. "This initiative will allow program enhancements to help Walmart avoid DEA enforcement as a result of non-compliance with 21 CFR 1301.7 ..." dealing with suspicious orders.

So that's some of their own internal documents, and, frankly, they're powerful evidence of their failure to comply with these requirements.

I want to turn next now to the stories of Dr. Diamond and Wade and their prescriptions and their thousands and thousands of prescriptions being filled by Walmart. This is based both on the ProPublica article, which is Exhibit 221, and confirmed, in many respects, by Walmart counsel's letter to the Justice Department, which are Exhibits 139 and 199.

This is an important story because it shows how affairs actually manifest themselves in the real world and how Walmart did not have an operating suspicious order system. As described in the article, pharmacists at Walmart recorded hundreds of thousands of complaints to the compliance department about prescriptions, and they were ignored. That's on 15.

And despite repeat complaints about certain doctors, Walmart refused to enter a blanket

refusal and corporate blocks. In fact, there are quotes here in emails about pharmacists were threatened if they didn't drive the sales.

Now, the article describes that Walmart had a refusal to file reports, the internal reporting system. And the article subscribes they didn't always report to the DEA as required and, when they did, they would remove information, including the pharmacists' comments, which would have obviously helped the DEA figure out if there's a problem.

Now, we know Drs. Diamond and Wade were -- you know, they were just corrupt people. They ran a pill mill. They were criminally prosecuted and sentenced to long prison terms, and that's undisputed. That's number 16, Slide 16.

But what's really remarkable, as described in the article, is that between 2014 and 2017, Walmart pharmacies filled 13,000 controlled substance prescriptions from Dr. Diamond. That's an average of 11 a day, amounting to over 1.3 million doses.

Similarly, between 2011 and 2016, over 100 different Walmart pharmacies in 17 states filled controlled substance prescriptions from Dr. Wade, and

in 2015 and '16 filled, on average, nine controlled substance prescriptions per day from Dr. Wade. That's, again, in the ProPublica article.

Now, as we turn to page 16, what happened is the DEA became involved with Walmart because the agent surveilled people going to Dr. Wade's clinic. They followed them going to a Walmart to get their prescriptions filled for these painkillers. And then they -- the DEA subsequently raided the pharmacy. And in addition, Walmart was served with additional search warrants, information requests, and subpoenas. And the volume of prescriptions in the geographic area are clearly red flags and -- as are the repeat warnings from pharmacists.

Now, I do want to get to the U.S. Attorney story, which is obviously part of the ProPublica article. The U.S. Attorney for the Eastern District of Texas was threatening to prosecute Walmart and its compliance manager, Mr. Nelson. And according to the article, Walmart went to DOJ and DOJ overruled the U.S. Attorney's Office.

Whether or not there was evidence sufficient to warrant an indictment or if the DOJ

decision was politically motivated isn't really what's important. What's really important is that the quantum of evidence was sufficient that a U.S. Attorney thought they should be having that discussion that Walmart or its compliance director should be indicted. Because, as Your Honor knows, the burden of proof for a criminal prosecution is so much higher. It's beyond a reasonable doubt, especially compared, not only to a regular civil case, but the credible basis here.

So kind of then coming around full circle, you have Judge Polster on the MDL denying the summary judgment to Walmart because there was evidence sufficient to support a verdict against Walmart that they failed to comply with their reporting requirements. And we've seen some of this.

And not only do you have the MDL and the documents we've seen, but a number of state AGs have sued Walmart on their opioid crisis: Nevada, New Mexico, South Dakota, and West Virginia. Those are Exhibits 163, 152, 196, and 262. Some in the last year or two. And I'll just say government actions carry a certain weight of credibility.

And then, finally, as Walmart has

admitted in its recent 10-K -- and that's Exhibit 151 -- it is the subject of various governmental investigations. And that's Slide 21.

So taken together, this more than adequately establishes the credible and best basis to investigate Walmart's fiduciaries for failing to implement and maintain controls related to the suspicious orders of opioids and where they failed to exercise oversight.

So that's my proper purpose presentation. If Your Honor has any questions ....

THE COURT: All right. I take it Mr. MacIsaac is not going to do anything supplemental on proper purpose, or are you?

MR. MacISAAC: I will.

THE COURT: Why don't we get all the proper purpose things covered.

MR. MacISAAC: Very quickly, yes, Your Honor. And I will be brief.

So I think the supplemental demand, which is at JX 257, primarily deals with the years of concealment of the 2011 MOA, the District of Texas' contemplated criminal indictment, as well as the Eastern District of Texas' contemplated civil claims

which Mr. Wales just briefly discussed.

The only disclosure made by the company -- and this is done in two 10-Ks -- but the first disclosure is made in the first quarter of 2018. And that is JX 129, page 16. That disclosure, which is repeated again in later disclosures, states that: "The Company has also been responding to subpoenas, information requests and investigations from governmental entities related to nationwide controlled substance dispensing ... practices involving [the sale of] opioids."

It goes on to state, "the Company can provide no assurance as to the scope and outcome of these matters and no assurance ... whether its business, financial [condition or] results of operations ... will ... be materially adversely affected."

Your Honor, the issue here is based on the -- I believe the company's own admissions. And those admissions were made in letters made publicly available through the ProPublica reporting. The company's own statements as to the conversations with the government itself call into question the disclosures that had been made by the company.

As we know, Delaware law prohibits directors from deliberately misleading or concealing material information from stockholders. That's *Malone v. Brincat*. More recently, *Dohmen v. Goodman* where the Supreme Court recently reiterated the requirements of *Malone v. Brincat*.

But more importantly is the overlay of federal law. I think it's just axiomatic that under Federal Law 10(b), when a company chooses to speak, they must do so truthfully. And, more importantly, where there is a regulation that requires disclosure of specific information, the company is required to do so. And here, Your Honor, Item 103 under Federal Securities Laws is where our focus is. That's at JX 289.

Item 103 discusses "material pending legal proceedings." And what the regulation states is that to the extent a material pending legal proceeding exists, a company must disclose "the name of the court or agency ... the date [the action was] instituted, the principal parties ... [as well as] a description of the factual basis alleged to underlie the proceeding and the relief sought."

Now, that Item 103 goes on to state

that other government authority actions that are "known to be contemplated" must be disclosed and similar information must be disclosed.

Now, there is an issue I believe the parties are, you know, kind of back and forth on, which is Item 103 has a 10 percent threshold. What I mean by that is to the extent there are monetary reliefs sought in these actions, it has to equal 10 percent of their total assets. But that exclusion relates solely to monetary penalties.

So with respect to the 2011 MOA, the nondisclosure of that, the question we have is: Is it a material legal proceeding, or was it a government action known to be contemplated? And the answer here, Your Honor, is it's not me trying to impose a materiality standard on the company.

JX 180, which is a June 2014 Portfolio Scoring Worksheet -- Mr. Wales just showed it to Your Honor -- states in no uncertain terms that the potential reputation or financial harm from this specific agreement could be "severe." And that was the fourth of five options to check. And the third option was "material." So it was greater than material; it was potentially severe to the company.

So with respect to the 2011 MOA and a question presented, at least by the defendants in their briefings, that we haven't shown that this is material, I'm not trying to show that something is material, but the company's own documents admit as of June 2014 that they viewed this as actually greater than material. It was severe.

With respect to the contemplated criminal indictment. Again, Your Honor, Item 103 states that anything "known to be contemplated by governmental authorities" must be disclosed. This is a nonmonetary relief sought; an indictment.

JX 139, page 5. Again, this is the company's own letter. And in that letter they are stating that "AUSA Rattan notified Walmart on March 28, 2018, that she intended to present an indictment against Walmart ...." There is a known contemplated government proceeding by an AUSA, and the disclosure made by the company immediately after that information is known is merely that there are investigations outstanding.

And if you're going to speak as a company, you must speak truthfully, especially when there's a specific regulatory requirement to disclose

information. And Item 103 outlines exactly what must be disclosed, similar information to the date instituted, the agency involved, what the factual basis underlying that is, and the relief sought.

And I believe the company's own cited case law supports the disclosure of the contemplated indictment. They cite to *Richman v. Goldman Sachs*. And there, the Court, the SCNY, stated that a proceeding "known to be contemplated by governmental authorities" -- that's the quote, and I'm adding this -- must be disclosed under Item 103 when it "reaches a stage [when the] agency or prosecutorial authority makes known that it is contemplating filing suit or bringing charges." So that is precisely what had occurred at the period of time when this disclosure about investigations happened. Yet it wasn't truthful.

And the third issue is the contemplated government civil claims. Your Honor, these are, again, based on the letters that the company had sent to the DOJ. We know -- and Mr. Wales was just discussing -- that JX 139, page 4, discusses how AUSA Russ notified the company that -- the belief that the civil claims were a billion dollars. We know

that JX 199, page 1, note 1, that it had expanded, that the investigation now included 15 attorneys' offices across the nation known formally as a "Working Group" who were investigating these civil claims.

And at no time has the company disclosed the existence of the Working Group, the existence of what those claims may involve, despite being told by the DOJ that this was at least believed to be a billion dollars from a settlement standpoint of value that they believed may be recoverable.

Now, because it's a monetary case, because it's a civil claim, the question then comes under Item 103: Does this require disclosure? And the answer is yes. And the reason is because the company has repeatedly disclosed the opioid MDL in its disclosures. And, under Item 103, to the extent that you have similar cases that overlap, they must be disclosed after aggregating them, if in the aggregate they equal over 10 percent.

So at least at this stage, there is some evidence to believe that they believe the opioid MDL could potentially implicate 10 percent or more of their assets and that this underlying civil contemplated claim by the government should have been

aggregated in that analysis.

In fact, Your Honor, if you take a look at JX 199, page 3, the company itself admits that all of the documents in the opioid MDL were produced to the government, showing that these two actions are clearly overlapping and clearly intimately involved with one another.

Yet again, Your Honor, the disclosures make no mention of this information. And I think what is troubling is that we see a course of conduct over many years that the disclosures at issue are misleading or omissive of material information. And it's not just in the disclosures.

JX 225 is an article by ProPublica following up on the airing of nonpublic information to the public generally, and how that same information was not disclosed or produced in the opioid MDL to the plaintiffs there as well. So stockholders and the plaintiffs in the opioid MDL are being left in the dark about these issues, despite Delaware and federal requirements to disclose this information.

So I think the question comes -- before we move on to scope -- would be: Well, what's the board involvement? What was the board's knowledge

of these issues and their activities in bringing about these disclosures and -- you know, or nondisclosures in this case?

And that's really all that we want to, from a proper purpose standpoint, understand when we go to scope. So I think, for me, that's everything on proper purpose.

THE COURT: Thank you very much.

MR. MacISAAC: You're welcome.

THE COURT: Mr. DiCamillo?

MR. DiCAMILLO: Thank you, Your Honor. I'm going to respond to Mr. Wales' presentation, and then Mr. Berkowitz is going to respond to Mr. MacIsaac's presentation. I think we'll take far less than the half an hour that Your Honor has allotted for this portion.

Your Honor, we've got our slide presentation up.

If we can go to the next slide.

Your Honor, just by way of background, dispensing opioids is a very small part of Walmart's business. Walmart has never manufactured opioids. Walmart has never distributed opioids to pharmacies outside of its own pharmacies, and it stopped even

doing that in 2018.

Today, Walmart does continue to dispense opioids at its own pharmacies. And if we look at the slides, Walmart operates largely -- or operates through three business -- three reporting segments. First is Sam's Club, which we have up on the slide now. Sam's Club represents 11 percent of Walmart's revenues. Then we have Walmart International, which represents about 24 percent of Walmart's revenues. And then we have Walmart U.S. Walmart U.S. constitutes about -- generates about 65 percent of Walmart's revenues.

If you look down in the bottom right of this slide, you see that dispensing opioids is just a small part of the Walmart U.S. business. It's part of the Health & Wellness division of Walmart U.S. And the Health & Wellness division generates about 11 percent of Walmart U.S.'s revenues and about 8 percent of Walmart's total revenues. So you see that, as we've indicated and we indicate in our briefing, dispensing opioids is just a small part of Walmart's overall business.

With respect to plaintiffs' proper purpose argument, their proper purpose argument is

based largely on unproven and unadmitted allegations from the MDL litigation, or assertions made in the ProPublica article. In fact, during Mr. Wales' presentation this afternoon, and we saw it in the brief as well, they rely on a handful of documents that the plaintiffs in the MDL litigation relied upon in connection with their motion for summary judgment.

But what's missing is a connection and a link to alleged wrongdoing by Walmart's directors or senior officers. They haven't linked -- other than showing the audit committee charter, they haven't linked any of their allegations of wrongdoing to allegations by members of the board or senior officers.

Walmart's self-distribution practices have never been the subject of a government enforcement action. As we've seen, and as we can see, there are investigations ongoing, and Walmart has disclosed those investigations since June of 2018.

But, unlike in the *AmerisourceBergen* case where there had been specific actions taken by government entities, you don't have that here. In *AmerisourceBergen*, the license of one of the distribution centers had been suspended. And we had

two Congressional investigations concluding that *AmerisourceBergen* had failed to identify and address suspicious orders.

Here, the linkage between alleged wrongdoing that they claim went on and any alleged wrongdoing by directors or senior officers is missing.

I do want to spend a little bit of time -- that's primarily our proper purpose argument, Your Honor. As Your Honor indicated at the beginning of this, I think this is well-covered in the briefs, so we relied largely on our briefing for the position. But I do want to spend a few minutes talking about what has been the centerpiece of their proper purpose argument in their demands, in their briefing, and here again today. And that's the 2011 memorandum of agreement which is Joint Exhibit 9. That has been the centerpiece of their request for books and records in this case.

The plaintiffs have continuously exaggerated the import of the 2011 MOA. The 2011 MOA pertained to dispensing -- not distributing, but dispensing controlled substances at one Walmart pharmacy in San Diego. And we see it on Slide 5, which we have up on the screen, the repeated

references to "dispensing" and "dispensed," nothing about distribution.

If we go to the next slide, we see Walmart did not admit any liability or admit any of the allegations brought by the DEA that led to the 2011 MOA.

If we go to Slide 7, Walmart did not pay any penalty or fine in connection or as a result of the 2011 MOA. What Walmart did agree to do is maintain the compliance program, which it did. The 2011 MOA imposed no obligations regarding self-distribution or specific suspicious order monitoring.

Again, despite their repeated reliance on the 2011 MOA, there is absolutely no linkage between the conduct that was the subject of the 2011 MOA and any allegation of wrongdoing on the part of the directors or officers, because that's the link they need to establish.

Your Honor, we all know the standard for a proper purpose. Admittedly, it's a low standard, but it requires a credible basis of wrongdoing by fiduciaries. Here, we don't have that. What we have is a story that's cobbled together from

allegations, news articles, and documents that plaintiffs in the MDL litigation relied on, not documents that the company relied on. They haven't satisfied even the low standard of showing a credible basis of wrongdoing on behalf of the fiduciaries.

On that basis, we do not believe they've stated a proper purpose.

THE COURT: Thank you.

Mr. Berkowitz?

MR. BERKOWITZ: Thank you, Your Honor. I'm going to talk to the disclosure issues. There is no credible basis to suspect that any of the company's disclosures weren't proper.

Plaintiffs identify three issues that they say should have been disclosed: first, the existence of government investigations into the opioid portion of Walmart's business before June of 2018; second, whether the company should have disclosed the 2011 MOA that you've heard about today; and, finally, whether the company should have disclosed the Eastern District of Texas had threatened an indictment against the company and an employee. I'm going to speak about each one of those and establish that there's no credible basis and that what's going on here is an

attempt to develop evidence potentially for a securities class action as opposed to a derivative suit.

First, with respect to the investigation. The securities laws that plaintiffs quote do not require the company to disclose an investigation once it's opened. Instead, they require, of course, that the company "disclose 'material' pending legal proceedings," or material proceedings "known to be contemplated by governmental authorities."

And that's the plaintiffs' brief at page 30, but also the *Lions Gate* case, Your Honor, in which case the Court found that there was no need to even disclose the existence of a Wells notice, which was contemplated charges by the SEC. Here, the investigation was not a material legal proceeding, nor was it a proceeding known to be contemplated by governmental authorities prior to the time the government disclosed it.

As federal case law makes clear, a government investigation does not need to be disclosed until it reaches a stage when the agency or prosecution authority makes it known it is

contemplating filing suit or bringing charges.

Here, the plaintiff themselves admit that Walmart learned the Eastern District of Texas was considering criminal charges in May of 2018. Walmart disclosed the investigation in its Form 10-Q the following month. In other words, as soon as -- based on their own allegations, the plaintiffs' own allegations -- the government made known that it was contemplating filing charges, the company disclosed the existence of the investigation.

They were not required to disclose that investigation prior to June of 2018 for another reason as well. It would not have been material to the company. Plaintiffs claim that an aggregate of investigations could result in fines of a billion dollars. Item 103 talks about proceedings being material where the potential damages would exceed 10 percent of the company's assets. And while a billion dollars is a lot of money, with respect to Walmart, its current assets as of January of 2017 and 2018 totaled between 57 and $60 billion.

So from a materiality standpoint, even if they were aware of contemplated charges -- which there's no evidence that they were -- they wouldn't

have needed to disclose it.

Number two, for similar reasons, there's no credible basis -- again, that's the standard here -- to investigate whether Walmart should have disclosed the 2011 memorandum of agreement. Plaintiffs rely on ProPublica's sensationalist reporting, and they make it sound as if the 2011 MOA was some dramatic occurrence within the company.

But, as Mr. DiCamillo said, that's simply not the case. The MOA arose out of allegations involving a single pharmacy that dispensed controlled substances out of 4,000. Walmart agreed, as companies do, to resolve the matter to avoid the uncertainty and expense of litigation, but it did not admit to liability, and it didn't pay a cent to resolve the matter.

The MOA significantly also includes language that talks about a single inadvertent or negligent failure to comply not being considered a breach. Now, plaintiffs talk about this scoresheet that talked about it being a reputational risk. There is no credible basis to believe that that was something that was disclosed to the board, that it was analyzed under the federal securities laws, or that it

was material in any sense having to do with the federal securities laws. And they have not made any connection even close about that document, nor could they.

Finally, there's no credible basis to investigate whether Walmart should have publicly disclosed that the Eastern District of Texas threatened criminal charges against the company and a single Walmart employee. The law is clear that a company is not required to accuse itself of wrongdoing, nor is there a duty to disclose uncharged or unadjudicated wrongdoing.

That's particularly true here, whereas plaintiffs concede Walmart disclosed the investigation itself shortly after the company learned about the potential -- and I underscore that -- the potential for an indictment. Walmart was not required to speculate as to whether the indictments would follow the investigation. Any such speculation would have been wrong. In fact, we're two years subsequent to that now, and there has been no indictment.

But the concept that in a case that is still being considered that you would need to disclose or predict what the outcome of that would be, is just

not realistic, Your Honor. There are multiple levels of appeals within the Department of Justice. And, in fact, in a case such as this one, Walmart correctly reported what it knew, which was: We do not know what the outcome is going to be.

Nor several years after the alleged facts that they contend were disclosed have been made public has there been any shareholder action suggesting that anybody was harmed or fooled about any of this.

And so when you look at the proper purpose, you also have to determine whether there's any trauma associated with this to the corporation. In fact, there's no suggestion or implication that the market was shocked or surprised when the facts that they, plaintiffs contend, were concealed actually were disclosed.

And so, as we think about proper purpose, Your Honor, the disclosure piece -- which was raised only by the final shareholder here -- is an attempt to expand the scope of what it is they're looking to get in the areas where there's no credible purpose. And we would obviously ask Your Honor to look carefully -- as I know you will -- at each of the

elements and make sure that the scope of what they're requesting cues to a proper purpose.

Thank you for your time, Your Honor.

THE COURT: Thank you.

Mr. Wales, do you have any brief thoughts you want to reply with?

You're still muted, sir, so you need to unmute so we can hear your eloquence.

MR. WALES: Sorry about that.

THE COURT: No worries.

MR. WALES: Just very briefly, Your Honor.

The defendant's characterization of the evidence simply ignores most of the evidence that we presented. For example, the 2011 memorandum of agreement, they don't address the fact that it was expanded to all 4,700 pharmacies for a reason. They don't address the 2013 controlled substance risk assessment. They didn't address the 2014 portfolio scoring worksheet. They didn't address the 2015 compliance document about the need to do something to avoid DEA enforcement.

They didn't address the whole story of Drs. Wade -- the two doctors and the thousands and

thousands of prescriptions that they filled. They don't address the fact that there was a quantum of evidence, enough that the Justice Department was having the conversation about indicting them. And they don't address -- other than say, "Oh, it's just plaintiffs" -- the MDL rulings. Collectively, these are all classically types of things that support and -- fully support a credible basis. Thank you.

THE COURT: And, let's see, Mr. MacIsaac, do you have anything you want to add on the disclosure issues?

MR. MacISAAC: Your Honor, I mean, I think, generally speaking, you know, Mr. Berkowitz's presentation ignored kind of most of, I think, what's most important, and that is that whether or not a contemplated indictment is known to the company is stated in their own letter.

And I think the credible basis here, the idea of a trauma -- a lot of what Mr. Berkowitz is discussing, I think, is helpful if the board itself had made these determinations, if the board itself had reflected upon that; that's what we're trying to investigate to determine. And, you know, the idea that there must be a trauma is somewhat, I think, a

little bit too high level of missing the point.

And that is, if there are directors who are involved in a continuing concealment of issues that have been ongoing for many years, stockholders who are investigating should understand and better acknowledge the fact that certain directors -- whether they came on later in the process or earlier in the process -- took on a role in continuing to conceal material facts from stockholders that are material to the underlying claims that might exist.

And we are entitled, I think, on this record and what we have shown, to investigate that. And, you know, we can get into scope on this, but it's not a substantial amount of documents.

So that is everything for me, Your Honor.

THE COURT: All right. Great.

Well, I appreciate people's presentations on this. It's 2:30 -- it's actually 2:28, according to my computer clock. Let's go ahead and take a ten-minute break, and we'll resume at 2:40. Everybody can just turn off their screens, and then we'll get back together when we come back.

So I'm going to turn off my screen

now, and I'll see you back here in ten minutes.

(Recess taken from 2:29 p.m. until 2:39 p.m.)

THE COURT: All right. Well, for some reason, my camera isn't activating. I'm going to try it. There we go. Guess it took a little bit of time to heat up. It's been working hard today. It took a little bit of time to get going.

I'm going to go ahead and give you-all a ruling now on proper purpose. I really don't think this is a close call. I think that there are reasons to argue about what the stockholder plaintiffs have asked for in terms of scope. But as to whether they had a credible basis to conduct an investigation, be it on suspicion of corporate mismanagement or to investigate director independence, I do not see this as a close call. I think this is a quite clear situation.

And I say that in a context of a standard, which is: Do the plaintiffs have a credible basis to suspect? I do not know whether actual wrongdoing took place. There is some evidence of that, but that's certainly something that is hotly contested. But what I think there is, quite clearly, is a credible basis to conduct an investigation.

I am not going to go through, it would be about ten single-spaced pages of talking points about the factual background, and it would largely parallel what the plaintiffs said in their presentation. That's not because I think their evidence ultimately will prove persuasive on the merits of a legal claim for wrongdoing, but I think their evidence is clearly sufficient by a preponderance of the evidence to establish that they have a credible basis to suspect wrongdoing, which, as everyone understands, is the lowest standard in our law.

So just to cull a few highlights for you. In terms of obtaining books and records related to overseeing compliance with applicable laws such as the Controlled Substances Act, I held in *AmerisourceBergen* that it's not necessary for a stockholder to provide a credible basis to support actionable wrongdoing by the board of directors, precisely because one of the roles of Section 220 is to enable a stockholder to access information for the purpose of determining whether there's a link to the board of directors. I think those principles apply here.

What we have is substantial evidence of problems at Walmart. We have substantial evidence in the form of these opinions by the judge in the Northern District of Ohio. Granted, they are denying summary judgment, but they are finding that there is a credible evidentiary basis on which to go to trial and where there are triable issues of fact. That, to me, translates quite clearly and persuasively into the 220 context.

I think that the plaintiffs, based on that, have a credible basis to explore whether or not the board was knowledgeable about these issues or otherwise involved.

Let's assume that I'm wrong. Let's assume that, in fact, what the plaintiff has to do is provide a credible basis to suspect actionable board level wrongdoing in a 220 case, such that 220 really doesn't serve the purpose that the Delaware Supreme Court has said on multiple times that it serves, but that actually, to get 220 documents, you have to be able to establish the link to the board that 220 was ostensibly supposed to be used to establish.

Here, I think the size and magnitude of the issue is such that one could reasonably suspect

that there was actionable board level wrongdoing under *Caremark*. We know that the Controlled Substances Act required Walmart to maintain effective controls against diversion of opioids from legitimate medical, scientific research, or industrial channels, and it required Walmart to design and operate a system to disclose suspicious orders of controlled substances and to inform the DEA of those orders, including orders of unusual size, orders deviating substantially from a normal pattern, and orders of unusual frequency.

There is a reasonable basis to suspect that from the early 2000s to 2011, Walmart had no written policies or procedures. Zero. None. Nothing. There's a reasonable basis to suspect that Walmart relied on employees to look at daily orders and simply, based on their knowledge, let somebody know if they saw something that maybe looked kind of high.

These are statements taken from Judge Polster's ruling, but what they establish is a credible basis to suspect that the board of Walmart was not doing anything to comply with its duties to oversee the company under *Caremark*.

Again, I am not finding that. We are not at that stage yet. But, assuming for the sake of argument that there is a need to show a credible basis to suspect actionable board level wrongdoing, that's it. There's a credible basis to suspect that even after the 2009 order and the 2011 agreement, the board continued not to fulfill its duties to oversee compliance of the Controlled Substances Act.

There's a reasonable basis to suspect that, despite agreeing that it would maintain a compliance program designed to detect and prevent diversion of controlled substances, that as late as June 2014 Walmart still had no processes in place to mitigate those risks.

There's a reasonable basis to suspect that it was not until 2015 that Walmart implemented a system of thresholds. And even then, Walmart lacked any system to detect and flag orders of unusual pattern or frequency.

This is one of the reasons why I think that this is a case where, really, the question ought to be whether there's some basis for fee shifting on the proper purpose element. There does not appear to have actually been any reasonable basis to dispute the

proper purpose element. You've got Judge Polster saying that the record evidence suggests that Walmart's compliance program suffered from obvious deficiencies that a layperson could plainly exercise. That's a federal judge saying that. That is not an adjudication of liability. But that is pretty clear in terms of having a credible basis to suspect wrongdoing.

In terms of establishing board linkage, you have other sources as well. You have this June 2014 worksheet indicating that the effort to implement a suspicious order monitoring system was board informed. That's a document that points directly to the board. You have proxy filings and the audit committee charter which support a reasonable inference of board involvement.

And, again, these are indications of director involvement. These are not things that would inherently lead to liability. They're not things that would inherently even lead to the denial of a motion to dismiss under Rule 23.1. But what they do provide is a credible basis to suspect that the board was involved in this, either to the tune of doing nothing or to the tune of doing it inadequately, which is

sufficient for purposes of the plaintiffs' ability to obtain books and records.

Again, I just don't think this is a close call. My colleagues and I have been dealing with a multitude of these 220 trials. And I think what we need to start doing is paring things down so that we don't waste time on the stuff that's really not fairly litigable and we address the things that are legitimately litigable.

I think scope here is litigable. I'm happy to hear people's arguments about this. I don't see how you can say with a straight face that there's not a credible basis to suspect wrongdoing, given the documentary record, given the judicial rulings in the Northern District of Ohio, given the pattern over the years. It's pretty striking to me when you measure it against the low standard that we're using for purposes of a 220 investigation.

In terms of the disclosures, these are matters governed by federal law, but also by Delaware law, where if you speak, you have to speak truthfully and with candor. Clearly, as a publicly traded company, Walmart has to make disclosures that are required under the federal securities law. Not only

that, but each principal executive officer and principal finance officer has to certify compliance. Those are the Sarbanes-Oxley certifications.

They have to say that they reviewed the report, that it doesn't omit or state a material fact necessary in order to make the statements made in light of the circumstances under which such statements were made not misleading, and then, that the financial statements and other information presents in all material respects the financial condition and results of the company.

The signing officers, they're responsible for establishing and maintaining internal controls. They have to certify that they've designed internal controls to ensure that material information is made known to them, et cetera.

In terms of the annual reporting requirements, people have talked about those. And I recognize that, in terms of some type of financial penalty, disclosure is only required if the potential damages exceed 10 percent of the current assets of the registrant and its subsidiaries on a consolidated basis.

I don't think that the parties have

much disagreement in terms of the standards that apply. Really, where I think the disagreement is that defendant Walmart is arguing this case as if it were a motion to dismiss in a federal securities action. In other words, you are making the pitch as to whether the plaintiff right now has identified facts that would support a claim. It seems to me that the test is one step back removed from that.

The question is whether the plaintiff has identified facts which, by a preponderance of the evidence, would support a credible basis to suspect that there may be a claim. And once we are at that point, then I think that the basis for having a credible basis to suspect is established.

So, for example, regarding the 2009 order and the 2011 agreement, it would be premature at this stage to make a determination as to the materiality of either document. But I think the plaintiffs have established a credible basis to suspect that Walmart and the board may have violated their disclosure obligations under federal law and under *Malone* by failing to disclose information about that. And I think that's particularly true when you have this Sarbanes-Oxley certification.

In the 2007 agreement, Walmart agreed it would maintain a compliance program. To fulfill this requirement, Walmart would have had to have implemented a new company-wide system of internal controls, because at that point it's reasonable to suspect that Walmart had no process in place. Yet, we have certifications from the CEO and CFO affirming that there were no significant changes in internal controls or other factors that could significantly affect internal controls.

So there's something seemingly wrong there. It's not the right point in this proceeding to determine whether anything, in fact, went wrong. It's not even the right point in this proceeding to determine whether there's a legal claim. What this proceeding is designed to address is whether there's a credible basis to suspect that there's a legal claim. And there's a credible basis to suspect that there's a legal claim.

I think the same is true about the disclosure of the U.S. Attorney's threats to indict the company. That statement, there's reason to suspect that it was made in May 2018 and that the U.S. Attorney told Walmart that it was going to imminently

indict the company and that the company should pay a billion dollars to resolve the matter civilly. Walmart believed that the U.S. Attorney would indict the company within days.

When the June 2018 Form 10-Q came out, Walmart said that it had been responding to subpoenas, information requests, and investigations from governmental entities, but it made no mention of the criminal proceedings that the U.S. Attorney had threatened to file just one month earlier.

Then, finally, in terms of evaluating director independence, this, to me, is a laydown. This is a proper purpose. The Delaware Supreme Court has said that it's within a stockholder's power to explore these matters. They've criticized a plaintiff who didn't explore these issues and only asked for books and records on the merits.

So as to all three of these broad categories -- the underlying wrongdoing related to legal compliance, the disclosure issues under the federal securities laws, and then, finally, director independence -- I think, again, the first is so clear to me under the 220 standard that really the only question for me was whether there ought to be some fee

shifting for having put us all through this. The third one I think is also pretty much a laydown.

The disclosure issue, maybe you step back one step from the brink of fee shifting on that. But all of this, to me, is not even a close case.

Where I wanted to spend most of the time today is on the question of scope. Because here, I think that there is legitimate basis for debate as to what documents the plaintiffs get, how deep in the organization they go, what the time period is. And it's my job to try to craft an order that appropriately balances the company's interests and protects the company from an excessive investigation but, at the same time, gives the plaintiffs what is necessary and sufficient for their purposes.

So I would suggest that the most constructive way to do this would actually be to walk through the requests one by one and take them individually. And so, I don't know who I look to for that.

Mr. Wales, is that something that you're the right person to be asking for assistance in terms of the plaintiffs, or does somebody else have the baton for that issue?

MR. WALES: I have the baton for this issue.

THE COURT: All right.

And, Mr. DiCamillo, is the same thing true for you?

MR. DiCAMILLO: Depending on what it is, it will be either me or Mr. Berkowitz, Your Honor.

THE COURT: Great. Well, that's super helpful. So I think, let's walk through these things. Let's take them one by one and get through them as quickly as we can.

So what I'd suggest we do is each time, Mr. Wales, you can make your pitch, Mr. DiCamillo can respond, and I will potentially have some questions. And then we'll go from there. Let's do that.

MR. WALES: Your Honor, may I just raise one issue? We had put up front both time period -- because there are some agreements on some categories other than time period, as well as the definition of board materials. I didn't know if you wanted to do that up front or do that in the context of the first, because they seem to cover a lot of the requests.

THE COURT: If you think that is easier, that's fine with me too.

MR. WALES: Okay. Thank you, Your Honor. I appreciate that.

Thank you for your guidance on the proper purpose. I do think that does heavily inform the time period. And the time period, that's our Slide 23. Obviously I don't want to repeat everything that we've just spent an hour, hour and a half discussing and Your Honor summarized.

But we do believe that it's important to go back to 2010, because that's when the, kind of the story of the misconduct or potential misconduct on a criminal basis, whatever, really begins. Because when we talk about, particularly with the memorandum of agreement in 2011, you have a whole new process and procedure being set up. Clearly the board is going to be involved. I went through the reasons. Your Honor found that in the proper purpose.

Additionally, as Judge Polster found in denying the summary judgment, there was evidence they had no policies and procedures, which itself would be a separate violation. And then, as you move forward in time, you have the various documents we

went through this morning and that Your Honor also cited, including references, you know, like in the worksheet that the board was -- it was an executive directive and the board was informed.

And I can keep going through. But I just don't want to repeat myself. So I don't know at this point if the defendants are going to still challenge or try to limit to 2017 or not. I just -- you know, given Your Honor's ruling and what have you --

THE COURT: Let's find out. We don't need to belabor it.

Mr. DiCamillo, what's your view on this?

MR. DiCAMILLO: Thank you, Your Honor.

Our view continues to be that ten years is too much. And it's plaintiffs' burden to show -- again, we know the standard -- that everything is necessary and sufficient.

They argue that they should be able to go back to 2010 or 2011, largely relying on the 2011 MOA. I understand Your Honor has ruled that the 2011 MOA is a piece of the credible basis of wrongdoing. But I do think it's important to focus on what I

talked about before, that it dealt with one pharmacy, was dealing with dispensing, not distribution, the concept of suspicious ordering in the distribution context, not a dispensing context.

Also, we understand that Judge Polster ruled, and Your Honor has referred to that ruling, that there were no written procedures in place before 2011. However, if you look at what Judge Polster relied on to make that finding, Joint Exhibit 179, it shows that there were procedures and controls in place. Judge Polster focused on the fact that there were no written procedures, and we understand that.

But what plaintiffs are asking for here is ten years on everything: ten years on board materials, ten years on senior management materials, ten years on electronic communications regarding some of the issues that are at stake -- or raised in the demand. We think that is not narrowly defined enough.

And, in *AmerisourceBergen*, Your Honor contemplated sort of an iterative process where Your Honor ordered formal board materials for a particular period of time with the ability to come back. And we think, focusing just on the time period right now, you know, it seems to me that that might be an appropriate

way to handle this, to go back a reasonable period of time.

And we picked three years. And we picked that for a few reasons. One, it's the statute of limitations. I understand Your Honor ruled in *AmerisourceBergen* that that is not dispositive, and we understand it's not dispositive. But it's a period of time, particularly the period of time that they argue things were not disclosed. It goes back to the time when the MDL litigation was filed. It also is just, you know, a couple years after the 2011 MOA expired.

So, in our view, to say, "Yes, we had this MOA in 2011, so we get everything back to 2011 and 2010" is just far too broad and it needs to be more narrowly tailored than that.

THE COURT: So this is one of those places, Mr. DiCamillo, where again, as I adverted in *AmerisourceBergen*, I feel like having some understanding of what is out there and what is actually available would be important to me.

So taking that concept a little bit further, I don't think the statute of limitations is dispositive. And you're giving me credit for that, but I think I relied on *Saito* for that. It wasn't

something that I created; I think it was something that was already out there and I followed.

Given the story that the plaintiffs want to explore and the account that they want to investigate -- and, really, part of what they're trying to explore is: Are we dealing with a corporate recidivist on this issue? Is this something where for ten years there have been problems that weren't dealt with, or is this really, as your side would have it, some relatively isolated smallish things which certainly didn't rise to the level of a decade worth of chronic problems?

And I don't view it as the right forum in a 220 proceeding to make some ruling on that. I feel like the questioning in a 220 -- and I keep coming back to it -- is: Is there a credible basis to suspect, such that the plaintiffs need to explore or have a right to explore? And it does seem to me, based on that, that there's grounds to go back to 2010.

But where I am sympathetic to your position is to go back to 2010 for what? To go back to 2010 for what, not in the sense of why, but go back to 2010 for purposes of what categories and types of

documents.

And it seems to me that the things that are generally fairly easy for people to get, the low-hanging fruit of 220, are board materials, the minutes, the board packages, et cetera. But once we get beyond that, that's where I start to feel somewhat at sea, particularly when I'm trying to balance the interests of the company against the interests of the plaintiffs.

And without knowing what we're really talking about, I resist making a ruling that would essentially say they get everything back ten years. What I think exists is a basis to go back ten years. But it seems to me that, just as in plenary litigation discovery -- obviously this is not discovery, this is something that should be short of discovery -- but one would, as one goes back further, expect the funnel to narrow, even if it's -- "funnel" is probably too broad a term as it is. But you would expect the narrowing as you go back further.

So that's really what I'm looking for. So if I tell you off the bat -- and I think I am telling you off the bat that there's a basis to go back ten years. But what I'm not accepting and I'm

not telling you is you have to go back ten years for everything. How do we figure out the right balance, particularly as to older issues, so that we're not doing litigation-style plenary discovery but the plaintiffs are getting what is necessary and sufficient for them to explore their purposes.

So, Mr. DiCamillo, that's directed to you, and then I'll go back and get Mr. Wales' thoughts. But this is really something that I struggle with, and I would appreciate your insight.

MR. DiCAMILLO: Thank you, Your Honor, that guidance is helpful. If you accept, if I accept for a minute that Your Honor believes -- and I will because you just said it -- that there is a basis to go back ten years, it seems to me that the best way to handle that is essentially to do what Your Honor did in *AmerisourceBergen*. And Your Honor required going back a period of roughly ten years, but it was only for formal board materials.

And, to me, I think that is the most logical resting place here. If Your Honor is going to order ten years' worth of something, I think that is the most appropriate thing to do. Because while there's certainly a burden in doing that -- and I

don't want to minimize that burden -- the burden is certainly less than if we had to do, for example, email searches for a ten-year period, even if it's only a handful of custodians.

So it seems to me that this goes across a lot of issues. But the most, I think, fair result to both plaintiffs while protecting the interests of the corporation is to order the production of the board materials going back that far, with the potential to come back, as Your Honor indicated in *AmerisourceBergen*. You know, if it comes back and plaintiffs can show we really have a need to go beyond that, then I assume Your Honor is going to hear them on that.

But it seems to me that instead of trying to parse through every request that they've made with respect to, "Okay, does it make sense on this one where they've asked for senior management materials, do we go back three years? Do we go back ten years? Do we go back five years?" It seems to me that it's hard for all of us to articulate why some particular time frame is right. And if Your Honor is thinking ten years, it made a showing that ten years is appropriate, I would say give them the board

materials and nothing else for now.

And then we can focus intelligently, once they've got some materials in their possession, on having a discussion. And this is a discussion we wanted to have with them when we first responded to the demand. While we did say we weren't going to produce anything, we indicated a willingness to talk. They filed a lawsuit, and kind of events have all overtaken us. But I think that's the best place to start because it allows us all -- plaintiffs, me and Mr. Berkowitz, and Your Honor, if necessary -- to have an intelligent discussion.

THE COURT: Let's hear Mr. Wales' thoughts on that, if we could.

Mr. Wales, so, again, the starting point is that I think there's grounds to go back ten years. But I am -- again, you've heard me tell Mr. DiCamillo that I'm sympathetic to his point that going back ten years for everything is an awful lot of stuff, so help guide me.

You've heard Mr. DiCamillo's side of things. I know you have -- I counted four categories of documents where you're looking for officer level materials. But is there a starting point where you

get board level materials back to 2010 and then we see what happens?

MR. WALES: Well, thank you, Your Honor. Thank you for the guidance on that.

I don't think that is a good way to proceed at all. The 220 is supposed to be a summary proceeding. And here, Walmart fought very hard on proper purpose when, frankly, they shouldn't have, as Your Honor noted. And all we're doing then is making this process longer, more difficult, more expensive, and more burdensome for the Court if we have to keep coming back.

So -- and so I think we should really deal with our requests as framed, not as they would like to frame them, and then go through them. And I think that a lot of them are very specifically defined and are not burdensome. And let's see what we can do. If we get to one or two categories you say "I need more," then so be it. But I think that the better way, especially given the record, and here we are in court, is to start going through it.

THE COURT: Well, let's use our time together. But at least as a threshold matter, I'm holding that there is a basis to go back to 2010. I'm

not holding that the plaintiffs get everything they've asked for going back to 2010. But I am ruling at this point that there is a basis to go back to 2010. And the question is: What documents within that period do you get.

So, Mr. Wales, why don't you take it away?

MR. WALES: Sure. My next slide is 24, "Board-Level Materials." We wanted to define board level materials. Because there's this parade of horribles, emails and this and that. I mean, these seem to me to be fairly classic board materials. You have the board meeting minutes. You have resolutions. You have preparation materials. The attachments, what they were given to them to be -- to review before or at the meetings. That's what kind of is fairly core.

So we don't have this, you know, "Give me every email between every director." I think board materials like this should be centrally located, especially for a big company like Walmart, and we haven't heard otherwise.

THE COURT: So let me push on you a little bit, because to the extent it's -- I think minutes are easy, resolutions are easy. Presentations

that are in 2010 might have even been given in person or handed out in person or reports but are now loaded up on BoardVantage or some other similar meeting distribution site. It seems to me that those are easy in the sense of putting them in official board level materials.

Where the question arises for me is -- and it's a question for purposes of the company too. In terms of burden, assume there are emails sent around, two, three, four days before the meeting providing some realtime updates on an issue or some follow-up on an issue. And so it is something that is circulated more informally than what I would think of as this formal board level materials definition.

I have some sympathy that it's one thing to go and look in the folder -- be it a folder that's in a file in the real world or a folder that is on a computer somewhere or on a database -- and find these types of materials. It seems to me that it could be more difficult to find those realtime update emails, and that that's another step in my mind. But it could conceivably fall within your definition. So what's your thoughts?

MR. WALES: Sure. I'm sorry. I

didn't mean to interrupt you.

THE COURT: I was trying to wrap up in a coherent way, and you correctly ended the sentence.

MR. WALES: You know, we served interrogatories to ask about this. And they basically just said it's not necessary and they're overbroad, and they didn't give the type of specifics that Your Honor went to. And so -- number one.

Number two, I frankly have trouble believing, given there was an extensive criminal investigation, there was an extensive MDL, that they don't have these sort of documents collected. I think we have to step back and deal with a certain reality. When you are producing millions of documents to the government and the government's considering a criminal prosecution of an entity, they're going to want to know what the senior-most people did.

Frankly, I was an AUSA for six years in the Southern District of New York, and that's what I wanted to know. I started from the top down. Because it's one thing to hold a company responsible if, you know, Joe Pharmacist is doing something wrong as opposed to at a much higher level. So I would, frankly, be surprised if these haven't already been

collected, number one.

Number two, they haven't established that, and we asked them about, you know, a burden, and they basically gave us insufficient answers. We wrote back to them. So given, I would think, the kind of straightforward board materials we requested, they should be ordered.

THE COURT: All right. But what I'm interpreting you to say is this description that you've identified is enough, and if there's the type of stray email periodically that Laster is talking about, you're willing to not stand on getting every potentially responsive document. This is a fair definition, from your standpoint.

MR. WALES: If there's a stray email, I understand that. If it's their practice that, you know, for three years they send an update two days before or one day before, I would want to see that. And I think that fairly falls within it because then that's the type of things that they would routinely do.

THE COURT: Mr. DiCamillo, this is, frankly, generally consistent with my understanding of board level materials. Do you have pushback on

aspects of this?

MR. DiCAMILLO: If this definition in the slide presentation is consistent with my understanding of board level materials too, it's the first time it's been that narrow. It's been far broader in their demands and in their briefs. As written, I'm comfortable with this definition.

And I do think there's the possibility of the stray email that Your Honor potentially speculated about. But I don't have any knowledge, as we sit here today, that that's a regular practice or has ever happened. I acknowledge the possibility of it, and I think if we're ordered to produce board level materials, we can work to make sure that board level materials within this definition are produced.

THE COURT: All right. Well, let's use this definition. I have in my notes about the fight over the definition, but this is one that I'm comfortable with, and I'm going to adopt this as the operative definition for what people mean when they say "board level materials."

MR. WALES: Okay. Great. Got one too many documents at my desk. Category 1 is policies and procedures and -- basically on CSA suspicious order

monitoring. And they agreed to produce it, the only two issues were time period and scope. So in light of the rulings and comments, I don't know if there's anything else to discuss on this.

THE COURT: Mr. DiCamillo, I have in my notes too that you agreed to produce these documents. Now that I've ruled that it's 2010, can you produce these going back to 2010?

MR. DiCAMILLO: We can, Your Honor.

THE COURT: All right. Next issue.

MR. WALES: Okay. That is policies and procedures regarding oversight, internal investigations, and compliance reviews. The defendants basically have two arguments on why they won't produce them.

Number one, they say it's a big company and it has lots of different businesses and all of that. To the extent we weren't 100 percent clear -- and I, frankly, thought it was obvious -- we're talking about board level documents dealing with the Controlled Substances Act, opioids, nothing else. So I don't think that's really a real issue.

But I want to make sure that's clear that's what we're seeking so that they don't think

they have to start looking at anything else, although I don't think they will.

The second thing is they say that's not really covered by your demand. And I think it is. And I would ask Your Honor to turn to Exhibit 234, which is the Detroit demand.

THE COURT: All right.

MR. WALES: Okay. And in that, on page 16 -- tell me when you're there.

THE COURT: I'm already looking at No. 2.

MR. WALES: Okay, great. On those two sections, I would want to point you at, and that is 1.A) at the top. It says: "The Company's controls, procedures, and policies ... regarding compliance with the CSA ..." blah, blah, blah.

And then "2.A) Board-level systems instituted to monitor or reform the Company's standards or practices with the CSA or DEA regulation." You know, both of those systems are the policies and procedures. I mean, that's what you do, you set up systems, you set up controls. Those are the policies and procedures and systems.

These seem like pretty comprehensive

requests that would cover this. So we submit that it is covered. These are comprehensive requests, and we think they should be ordered.

THE COURT: Mr. DiCamillo?

MR. DiCAMILLO: Your Honor, I don't actually think we have a dispute here. Our objection to this request as it was argued in their pretrial brief was that it went beyond CSA and opioid issues. Mr. Wales -- and that's why we also said it wasn't asked for in the demand.

Mr. Wales has confirmed here on the record and these slides that he's just indicated the CSA, DEA, opioid issues, things that are the subject matter of the demand. As written, we don't object. As narrowed today by Mr. Wales and articulated here, we don't object to it.

THE COURT: All right. Well, I will adopt that agreement and order Walmart to produce those materials.

Mr. Wales?

MR. WALES: Number 3: complaints, reports, investigations, lawsuits, other inquiries. Walmart is willing to produce it back to 2017. In light of your ruling, I think the only listed time

period -- I don't know what Mr. DiCamillo's view is now.

THE COURT: Okay. Mr. DiCamillo?

MR. DiCAMILLO: We agreed to this. I mean, we're only objecting on the time period. Your Honor has ruled on the time period, we so will produce within that time period.

THE COURT: Fantastic.

Mr. Wales?

MR. WALES: Okay. We're flying through.

Director independence. Okay. We wanted director independence questionnaires for three years. They offered one year. We want director nomination materials for three years. They offered three years.

The only other thing we want is the original director nomination materials for the current board members. And we want that because Walmart is a controlled company. Mr. Walton has 50.2 percent of the vote. Greg Penner, who's the chairman, is the son-in-law of Mr. Walton.

And also in the proxy, which is JX 228, they have this kind of vague analysis of what

they look at to be considered not -- they have a chart. It's at page 32, and it says "the Board has determined will generally not affect a director's independence," and there's a whole list of things: Ordinary retail transactions, ownership, transactions, positions, benefits, but they don't say what those are at all. And given that it's a controlled company, we, frankly, want to know why these folks went on the board.

And so we're not asking for every year going back ten years. This is more limited. And so I guess the two places we have a disagreement are: Will they do the questionnaires for three years instead of one, and the original nominating materials for the current eight non-Walton board members.

THE COURT: So this is probably set forth somewhere, and it's my fault for missing it. But what is not springing to mind is what you mean by "nomination materials." Can you refresh my recollection on what that's talking about?

MR. WALES: Sure. It would be the board packages, whatever went to the nominating committee or the board as a whole that showed, you know, what the people's qualifications, independence,

and things like that.

THE COURT: All right. That's helpful.

Mr. DiCamillo?

MR. DiCAMILLO: Thank you, Your Honor.

On this, the question of director independence is relative to -- related to the potential demand futility analysis to the extent plaintiffs bring a derivative lawsuit. If they do that, the focus is on the independence of the directors, the current directors.

We believe what we've offered is the most recent director questionnaires and nomination materials for three years. It goes beyond really what is relevant. And it's more than enough to cover it.

And also, there's -- this is not a case where there's an allegation that Mr. Walton or someone in his family is -- I don't even know what the allegation would be with respect to the issues that we're talking about. It's not a situation where there's a transaction with a controlling stockholder and you need to look at relationships. This is, you know, allegations about the company's compliance with the law and controlled substance area. So I'm not

sure what relationships with the Walton family will tell you here.

But we are willing to give the most recent materials on these issues. And we think we've offered to give what is -- more than what is normally ordered, which is typically the most recent director independence questionnaires.

THE COURT: All right. I'm going to -- go ahead, Mr. Wales.

MR. WALES: I was about to say, we usually get three or four years on questionnaires.

THE COURT: My view is that three years is a good number. So I'm going to order the three years of director independence questionnaires and the three years of director nomination materials.

MR. WALES: Thank you, Your Honor.

MR. DiCAMILLO: Now that we're moving to senior management level materials, Your Honor, I'm going to let Mr. Berkowitz have some time.

MR. WALES: Well, the only other part of board materials would be related to the disclosures, and I should have said that Mr. MacIsaac would deal with that. So I don't know if you want to deal with that now or at the end, or what Your Honor

wants.

THE COURT: Why don't we keep going to officer level materials on this, and then we'll shift to the disclosures.

MR. WALES: Okay. Great.

Obviously, the senior management materials we want for a number of reasons. We could make a demand on the board. We want to know -- particularly we're very focused on the role of the CEO. Obviously, CEO is at board meetings, and if he has information he should be providing it, and is there a proper reporting system. So what we were trying to do is put this all in context so we know what we're talking about. And that was one of our hopes with the interrogatories.

And our first category is the Ethics, Compliance, and Risk Committee, and specifically to the extent it deals with opioid distribution, suspicious order monitoring and those sort of compliance issues.

Now, while there's some references to this in the public filings, I would refer Your Honor to Exhibit 297. 297 is a letter that Walmart's counsel sent to us on September 23. As we noted in

our brief, we were trying to deal with some of these issues and there was some back and forth, and so this was a letter they sent to us addressing a few of the issues we raised.

THE COURT: All right. I'm looking for it, and I'm not seeing it.

MR. WALES: It was 297. It was an exhibit that was added last night that was sent with the slides.

THE COURT: All right. I remember my assistant bringing it in.

MR. WALES: You know what, there's one paragraph I could just read to you if you want to keep going. And if we need more, we can deal with it.

THE COURT: Why don't you start out by reading it to me, and then we'll see if we descend into chaos.

MR. WALES: Okay, perfect. Being a bunch of lawyers, we might be able to get into chaos pretty quickly.

THE COURT: Go ahead.

MR. WALES: Okay. Thank you, Your Honor.

This is 297. It's a September 23,

2020, letter from Latham & Watkins to my colleague, Alla Zayenchik. We asked about specifically the Ethics, Compliance, and Risk Committee. And on page 3 in the middle they wrote: "The Ethics, Compliance, and Risk Committee is responsible under its charter for assisting each business segment and functional area of the Company through the oversight of ethics and compliance matters." And then it continues, "[The] oversight includes making recommendations about the identification, monitoring, and mitigation of compliance risks ...."

And then a little later in the paragraph it says, "Members of the Ethics, Compliance, and Risk Committee include Walmart's CEO and senior executive team, as well as the Chief Ethics and Compliance Officer and other members of management with responsibility for ethics, compliance, and risk oversight. The committee meets approximately ten times per year to discuss relevant topics related to ethics, compliance, and risk."

So here, we know it's the most senior people, including the CEO. We know they meet about ten times per year. So that's a pretty defined -- we're looking for something that's defined.

So what we're really looking for here is basically the equivalent of board materials but for senior management for this one committee -- you know, the minutes and the presentations and things like that -- so we could see what the most senior executives are being told about this.

And I think it's discrete, it's defined, and we know what it is.

THE COURT: Thank you.

Mr. Berkowitz?

MR. BERKOWITZ: Thank you, Your Honor.

With respect to their efforts to get senior management materials, I think what's important to step back and think about here is that there's no explanation from the plaintiffs and no engagement from them on why board level materials that we're willing to provide and have been willing to provide would not allow them to make the assessment that they already want to make. And they want to dig deeper and deeper to try and get more plenary type of discovery.

With respect to the Ethics, Compliance and Risk Committee, Your Honor, in response to a letter that they sent us after the close of discovery, we responded in an effort to engage with them -- as we

have been willing to do throughout this -- and we identified for them the people who are on that committee, which include, as you saw, the CEO.

We also told them in an interrogatory answer that the CEO has not reported to the board, at least in the last three years, on opioid-related issues. The people who have reported to the board on opioid-related issues include the chief ethics and compliance officer, who was a member of the Ethics, Compliance, and Risk Committee. So to the extent that there is anything relevant in terms of what the board knew, it would be in the board materials that are presented to them. And we don't need to dig down and do a committee below that merely because the CEO happens to be on it.

And so we would ask that this type of material not be ordered to be produced, certainly not at this stage. It rewards plaintiffs for failing to engage with us and taking the materials we had offered to provide to them at the board level to dig down and see if there's something that is actually necessary as opposed to something that they're interested in.

MR. WALES: Your Honor, may I respond very briefly? I don't want to get into the engaging

or not engaging. But we have a different view of the world, and I'll leave it at that and -- number one.

And, number two, obviously we're looking at the potential conduct or reporting up from the senior executives to the board, because that tells you, A, did they perhaps do something wrong on a fiduciary level, or B, is there a lack of reporting. Because, for example, if you had tons of information at the ethics committee and those folks aren't reporting up to a board, that's a problem. So that's why this very narrowly defined, most senior group is appropriate.

THE COURT: All right. Well, I'm going to grant this request.

Now, Mr. Berkowitz's argument is one that is going to start prevailing. You know, there's a few things down here that I'm not comfortable with and I think which go too far. But this request here, I actually liked it. It seemed to me that it was properly targeted at the people who were most likely doing exactly what the plaintiffs wanted to know about. That these committee materials, the extent that they read on the types of issues for which board materials were sought, were likely to be the most

probative things and to strike the appropriate balancing point.

So I am going to grant this request. But to foreshadow things to come, I do think that this is about as deep in the organization as I'm going to be comfortable going.

But, Mr. Wales, why don't you keep going. You may be able to convince me. But that's my ruling on this one.

MR. BERKOWITZ: And, Your Honor, if I may, and I'm not -- I heard your ruling and I'm not going to reargue yet. I would ask that you consider, given the narrowing of the funnel, that we cut a time period other than going back ten years on something like this to at least start seeing if there's anything here that is useful or valuable.

Because we're now getting into a situation of a committee below that has met approximately ten times a year. I don't know the extent of the formality of the minutes that are there or the other types of materials. And I want to be careful that we don't end up going down a rabbit hole here.

THE COURT: Yeah, I just don't know.

Why don't we find out what these things -- more about what these things look like and what there is. And why don't you talk to Mr. Wales in the first instance. And then, if I have to parse something on this, I will.

MR. BERKOWITZ: Thank you, Your Honor.

MR. WALES: Okay. On to the next.

Presentations, reports, and memoranda prepared by Walmart's Executive VP of Global Governance.

Your Honor, we're referring -- I'm looking at now Exhibit 121. It's a 2018 press release from when Rachel Brand joined as executive vice president in global governance and corporate secretary. And it noted that she will be -- she reports directly to the CEO and "will be responsible for the organization's Legal [and] Global Ethics and Compliance and Global Investigation, Security," and a bunch of other things. So that's what we understand the role of this person and why we understand it.

And then, obviously, we're very focused on the organization's compliance, right? Because, I mean, that's what we're really talking about here. So what we tried to do is make this one

very narrow.

We asked for any formal presentations, reports, or memorandum created for the purpose of reporting to the CEO or the board on opioid compliance related issues. We're not asking for committee meetings. We're not asking for that. We're asking for formal presentations, reports, and memorandum for reporting.

That's a pretty narrow -- that's a very narrow set of documents from a very senior person who has direct reporting to the CEO and oversees this area. That is an appropriate and narrowly tailored request.

THE COURT: So how is this different from things that would show up in the committee materials?

MR. WALES: I don't know. It could be they come back and say, "It's the exact same stuff, Dave," you know. The answer is I don't know. Not being there, I can't know what I don't know.

So -- but we tried to keep it very narrow. And it could be it is going to be duplicative in part, so it shouldn't be burdensome at all.

THE COURT: And to anticipate a point

that Mr. Berkowitz made last time: Is this something where you're asking going back to 2010?

MR. WALES: Yes. Because, again, the issues all go, you know -- the issues go back to 2010. We've seen that this is executive directed. We saw there was reporting up to the board. It's the type of thing that the board knew about. And it's a very long period of -- you know, it's a potentially long period of time that the misconduct occurred. So, yeah, we do need it.

THE COURT: Okay.

Mr. Berkowitz?

MR. BERKOWITZ: Well, Your Honor, to go to your solar system analogy from the oral argument in *AmerisourceBergen*, we keep getting further and further from orbit here.

And, look, this is the chief legal officer of the company who reports to the CEO and to the board. As we indicated in our interrogatory responses, the Executive VP of Global Governance has reported to the board on opioids, one of less than ten people who has. They will now be getting minutes and reports given to the board -- subject to privilege, obviously.

Now they're looking for separately something that is charitably called narrowly defined "formal presentations, reports, or memoranda" that would have been made to the CEO on opioid-related issues. There is no evidence -- and, in fact, we answered an interrogatory that the CEO did not report to the board on opioid-related issues.

So to the extent that the Executive VP of the Global Governance had something relevant to the board, she also reports to the board and that would be captured in those minutes. We would object to providing this level of information which would presumably be privileged.

MR. WALES: May I just briefly?

THE COURT: Sure.

MR. WALES: Obviously we're looking at the roles of the senior executives and is there a proper reporting system. And both of those you need to kind of look at: Was the information slow going up?

And this is very narrowly defined for a specific purpose. And obviously a person making a formal presentation or a report to either the CEO or the board is going to do it carefully, and it's going

to be on a probably limited number of documents.

THE COURT: I'm going to allow it as framed. But I'm also going -- I have the same expectations that I think Mr. Berkowitz does, which is most of this, if not all of it, is likely to be privileged. But I can envision where knowing the times of the formal presentations, reports, or memoranda that were presented to the CEO or the board would be necessary for the plaintiff to be able to show that there was knowledge or, if there was a lengthy period of no reporting whatsoever, some form of, effectively, dereliction of duty.

But I'll be surprised if you actually get nonprivileged material out of this as opposed to a log that lists some things.

MR. WALES: We shall see.

MR. BERKOWITZ: And, Your Honor, on that, obviously the definition sitting here today arguing virtually in Delaware court may seem very clear. To the extent that, you know, we've got issues or questions about what that means, we'll obviously work with counsel and bring any concerns to your attention.

THE COURT: Yeah, please do. There

again, I suspect on this one you'll be somewhat protected by privilege. But I understand where you're coming from.

MR. WALES: Okay.

THE COURT: Mr. Wales?

MR. WALES: Okay.

THE COURT: I can already tell you, this is one where you're going to have to tell me why this isn't just a lot of stuff.

MR. WALES: Fair enough. No, I understand. The pharmacist complaints records and the reports obviously are potentially a broader category of documents, I understand that.

I think we need to step back a little bit and say: Look, Walmart's ethics and compliance was led by the global chief ethics compliance officer. That's the CECO, and then you've got a U.S. CECO. And we know that compliance has specific documents. We've seen the portfolio scoring worksheet. We've seen the controlled substance risk assessment and, again, we're trying to get an understanding of what is the reporting system.

For example, if there's direct reporting of the summary of this up to the CEO or up

to the board, great, we have that answer. But if we don't have that sort of information going up, then we need to know that because then you don't have the reporting system.

And so, you know, that is an important factor in trying to determine whether there is a breach of fiduciary duty. I guess the two core types of documents we're aware of are the portfolio scoring worksheet -- which I think was a compelling document -- as well as the controlled substance risk assessment. So if there's some summary going up to the CEO or the ethics committee or the board, great, we'll take that. And if there's not, then, frankly, to see if there's a total lack of reporting, we need the underlying materials because -- at least to those two types -- because we know that they are reflective of problems.

THE COURT: Mr. Berkowitz?

MR. BERKOWITZ: I think we're actually in a different solar system entirely here. They're looking for plenary discovery documents that are at the lowest level of wrongdoing in the hopes of determining that, you know, there was a complaint to the pharmacy in California that somehow didn't make

its way up to the CEO.

They've gotten an extensive amount of 220 discovery, per your order today, that will show what the board was aware of, what the Ethics, Compliance, and Risk Committee were aware of.

And this is -- I won't say a bridge too far, but this is thousands of pharmacy level records and materials. And it's an overreach that is akin to plenary discovery in litigation and not appropriate, not necessary in a Section 220 matter.

THE COURT: I agree with that. This, to me, has the feel of plenary discovery. And it also seems to me that to the extent there are reports that are flowing up to the CEO about these matters, or to senior management, you're going to get them as a result of the other areas. So this is not a category that I think is necessary or sufficient for purposes of the inspection.

MR. WALES: Okay. Number 4, that's the Walmart corporate affairs and government relations to the extent they were provided to the board or the CEO. Again, we tried to narrowly define it to limit it to reporting to the board or CEO. And perhaps the board stuff -- it will just be in the board materials

and we don't need it. We obviously don't know.

As for the CEO, again, here it's going to go to, you know, what did the board and executives' knowledge of these sort of issues -- I mean, if they want to claim they were unaware of these problems at the same time they're authorizing substantial legislative efforts to change a law or to avoid a prosecution, that goes to their knowledge. And so we do think this is a very appropriate one. And because it's limited to the CEO or the board, provided to the CEO or the board, it is appropriate.

And I just also wanted to add -- let me pull it out of my pile of documents here. And this is from their proxy, Exhibit 228, the page that ends with 256. And the Nominating and Governance Committee "reviews and advises management on ... legislative affairs and public policy engagement." So we would expect at least some involvement of the board. But you have to know the role of the senior executive as well to get an understanding of this. So that's why we tried to define it very narrow.

THE COURT: Mr. Berkowitz?

MR. BERKOWITZ: I'm not sure that they were successful in defining it narrowly. I'm still

not sure what the purpose for the relationship or the crux of the issue here is. They start talking about changing of laws, which has never been mentioned before in their papers. They intimated that perhaps they would report to the board that, "Hey, we talked to elected officials and talked them out of indicting us." It's all speculation. There's absolutely no evidence to find that.

To the extent that corporate affairs or government relations talked about the opioid crisis -- or issues related to their demand -- to the board is going to be reflected in the minutes, and they would get that. Otherwise, Your Honor, this is rank speculation about what might be out there and not tied at all to any proper basis, and certainly not necessary at this CEO level. Again, it's almost impossible to pin down because it's so speculative.

THE COURT: Yeah. So I'm going to deny this request. I think the idea that it would show knowledge or be relevant is the type of thing that one could get in plenary litigation, and it might be fairly probative for the reasons that Mr. Wales identifies. But it doesn't seem to me that it's necessary for the plaintiffs' purposes. And perhaps,

correlatively, that what I'm already giving the plaintiffs is sufficient. So this is not a request that I'm going to enforce.

MR. WALES: Thank you, Your Honor.

And the last one, putting aside the disclosure stuff, is there's a handful of documents that we've identified in either the MDL or the ProPublica article that we would think have either very specific -- they're not very burdensome, it's only a handful of documents. They know what's in the MDL. And we would like to see those because those are going to help inform, you know, obviously issues that we've been discussing today. And certainly, they could not be deemed burdensome in any way. And the courts have ordered things like this.

For example, in the *United Health* 220, the Court ordered the production of documents cited in the government complaint. So this seems very narrowly defined. These are all issues we've been discussing for purpose, and so we'd ask that these be produced.

THE COURT: Mr. Berkowitz?

MR. BERKOWITZ: Again, Your Honor, to the point that you made with respect to the last request, in light of what you have already ordered

produced, this type of request is not necessary. It is burdensome.

There are confidentiality agreements in place in these areas. The scope of the MDL is much broader than the proper purpose that they're looking for. They're looking for depositions, including ones that have been sealed by other parties other than Walmart, about areas to go on what can really be described as a fishing expedition.

This is the opposite of what you would get in a books and records type of thing. There's a reason that those documents are not in the public record. They have full access to what is in the public record in that matter, including Judge Polster's summary judgment ruling, as well as whatever plays out in the public record, and that's plenty for them to do what is necessary for their purposes.

It would be a terrible precedent to set to start ordering the publication of documents that were otherwise -- or the production of documents that were otherwise leaked improperly and are subject to sealings in other matters that would allow them to get the types of things here.

THE COURT: Someone needs to check

their mic.

Mr. Wales?

MR. WALES: Look, you know, let's start in reverse. The ProPublica article is a very public article. It got a ton of press. It's out there. I mean, some of these things are highly relevant. For example, Walmart had a prior 220, Your Honor --

(Brief interruption.)

THE COURT: Can we mute whoever is talking right now?

Ms. Bozman, can you take care of that? Thank you.

MR. WALES: I'm sorry. Your Honor, you recall there was a prior 220 that went up to Delaware Supreme Court a few times involving Walmart, and that's where they were bribing government officials. And that was based on a newspaper article and underlying documents that were taken.

So, I mean, look, this is, you know, what happens. Things get out in the press, and they're in the public domain now. And so certainly the two email chains in the ProPublica article are not burdensome. As soon as that article came out, I

assure you, Judge, someone pulled them and looked at all of them.

And as to the MDL, you know, we ask for certain specific items. There are sealing orders, and there are certainly exceptions to that. I mean, we did the *McKesson* derivative action, and we got a bunch of the stuff from the MDL.

So they haven't shown that what we're asking for is a problem. But certainly we'll work with them on that. And this is, you know, a very defined request.

THE COURT: All right.

MR. BERKOWITZ: Your Honor --

THE COURT: I'm hesitant to do this. It seems to me that we need to keep a line between the underlying plenary litigation and then this proceeding.

Now, the exception that I will make -- because it is my belief that when a court relies on a document, that that becomes public and fair game. So I will require Walmart to produce, not the materials that were filed in support of the motions, but the materials that were cited by the federal judge in the two summary judgment rulings.

He had some footnotes with citations to exhibits. He also had cited pages of deposition testimony. I will require production of those. Again, because I think that those are now publicly identified as bases for the judge's ruling. But I'm not going to go beyond that.

And, as I said, I'm generally hesitant to cross the line into what is being produced in discovery in the underlying plenary action.

MR. WALES: Understood. So the two things we have left, Your Honor, at least on my list, are the disclosure documents, and then we have some dispute as to conditions of production.

THE COURT: Yep. That's what I have too.

MR. WALES: So in what order would you like to take these in?

THE COURT: Why don't we go to the disclosure documents, and then we'll finish up with conditions on production.

MR. MacISAAC: Thank you, Your Honor.

I'm trying to think through these issues as you spoke to make this as simple as possible. And I think the fairest way to look at

this, you know, there's the -- we kind of look at the 2011 MOA as being, I think, one of the trigger points, at least from a credible basis standpoint, that we'd be looking at from a disclosure standpoint.

So if I just address the 2011 MOA, I think what would be fair would be an understanding of board materials with respect to, let's say, the year following the 2011 MOA, which -- up to the point of the 10-K that was disclosed following the 2011 MOA, our understanding of board materials with respect to the disclosures of that 2011 MOA. So that may include audit committee quarterly 10-Q discussions. That may include the 10-K at the end of that year. But that's -- limited to that would be for the 2011 MOA. And then to be -- you know, as to the -- as much compromising as possible, kind of the same analysis for the disclosure that occurred in June 2018.

So we have a disclosure of investigations at a time when at least internal records are showing there was a contemplated indictment. So to the extent there are audit committee materials or board materials discussing the 2018 Q2, I believe it is -- or Q1, I apologize -- Q1 2018 disclosure as well as the 10-Ks, the disclosures

in the 10-Ks made thereafter, because it included the same disclosure, and it also included board involvement in those disclosures, we would want to review that as well.

So I think that's, if I look at it, a total of about seven meetings -- four in 2012, and then three from June 2018 -- and then the 10-Ks in 2019 and 2020. That would be the board materials, and that's it.

THE COURT: Mr. Berkowitz?

MR. BERKOWITZ: So, first of all, I don't know what the universe of these things are. And let me try and just talk through them a little bit. I'm going to make one last effort, at the risk of incurring your ire, Your Honor, on the 2011 issues, which is, you know, going back that far, even if there were an issue -- which there weren't -- there's a five-year statute of repose. And so going back literally nine years on something on an MOA seems far afield.

To the extent that you want us to do something, I suspect what we would be looking for would be: Was the MOA mentioned as a possible disclosure item at the audit committee? And to the

extent that it was, you know, indicate that or reflect minutes of that. It may be privileged, but something that would indicate whether it was even on the radar.

With respect to the 2018 disclosure, again, I guess what we're talking about is something that would reflect that there was discussion around the disclosure or something even at that high level, Your Honor, as opposed to going into detail or drafts and so forth with the audit committee were reflected, if we would first look to the minutes to see whether there's anything there and then go from there.

THE COURT: Mr. MacIsaac, do you want to respond to Mr. Berkowitz's proposal?

MR. MacISAAC: I think in a first instance it would be fair to look at minutes materials. To the extent something comes up that may say some report was relied upon or something was at least not in the materials seemed to be a basis of the discussion, we may kind of cross that bridge and ask and request that information be produced. But I think that's a fair compromise that Mr. Berkowitz in the first instance provided.

THE COURT: Let me say what I understand to be happening here. So I do want the

seven meetings or -- ballpark seven meetings that Mr. MacIsaac identified to be subject to production. I recognize Mr. Berkowitz's argument about the five-year statute of repose. But I think that for purposes of this, it's legitimately something that is necessary for the stockholders to receive.

And I also think that we should -- we are talking in the first instance about the minutes of these meetings. And then once we go beyond that, I'd like you to confer about it. But it seems like you're on the same page, at least during this present time when you're in front of me.

Why don't we give this a shot and see if you-all can't figure this one out along those lines that I just articulated in summary.

MR. MacISAAC: Thank you, Your Honor.

THE COURT: Mr. Wales, do you want to address the two conditions? You're back on mute so we're being deprived of your eloquence.

MR. WALES: Sorry about that.

So let's just be very clear. We agree to a reasonable confidentiality agreement, and we agree to an incorporation by reference. We just think there needs to be a balanced incorporation by

reference provision. And that is that, so that neither party can cherry pick, we're going to get a good faith production of what Your Honor has ordered them to produce.

And so we would ask that the incorporation by provision be limited to the documents that Your Honor has ordered them to produce and not something else. Because they could otherwise throw stuff in that we have no idea whether it's complete, incomplete, or anything like that.

And also that it be limited to, they give us a certification that in good faith they believe this is complete -- and we've obviously done that now in a number of cases. Because it helps to know that there has been a good faith done to produce, which you would frankly expect from counsel. And it gives the Court some comfort if they're relying on this, especially if there's a situation, for example, where you say there was no reporting, then you know there was actually no reporting. There's not 50 other documents out there.

Additionally, we don't want incorporation after they've given that certification. Because we did have a problem in one case where they

gave the documents, they gave the certification, we filed the complaint, and a week before they filed their motion to dismiss they said, "Oh, we have a few more board materials and we're going to rely on those on the motion to dismiss." And we didn't think that was a fair thing or appropriate thing to do.

And then, finally, we would ask for a privilege log, which I think is pretty standard and necessary for us to understand. So those are what we're looking for and why.

THE COURT: All right.

Mr. DiCamillo?

MR. DiCAMILLO: Thank you, Your Honor.

We have no problem providing a privilege log, so we don't have a dispute on that.

On the confidentiality agreement, I think we're very close. I think the only thing we're arguing about is the concept of incorporation by reference. Both parties seem to agree that the concept of incorporation by reference, as Your Honor first articulated in the *Yahoo!* case, is appropriate and should be adopted in any confidentiality agreement. What we've been resisting and continue to resist is a requirement that we certify that we

produced every document. We have -- Your Honor at the end of this is probably going to ask us to put together a form of order. Your Honor will enter that order. We then have to comply with that order. And we will comply with that order, and if we don't comply with that order, there will be consequences. We intend to comply with the order and will produce what we are ordered to produce. And we will tell Mr. Wales when we are done, when we believe we are done, producing what we have agreed to produce.

Mr. Wales wants a firm cutoff; that once we tell them we're done, we then can't produce anything, or if we do produce it, it's not incorporated by reference. I don't have a problem with that concept, that we shouldn't be allowed to keep producing documents. You know, for example, after we've seen a brief and we say, "Oh, yeah, here are another couple documents that we want to rely on too."

But we also don't think it's fair to have to provide a certification which would not be required of us in plenary litigation with respect to discovery, and have that be the cutoff. We all know that we're looking at things, we've determined things

come off of a privilege log. Something that we argued is privileged, upon further reflection we decide is not privileged so we provide that.

So I don't think our views are really that far apart, Your Honor. What I think is appropriate is that Your Honor order incorporation by reference. And that, to the extent there is a dispute about it, the judge -- whether it's Your Honor in the follow-on derivative suit or one of your judicial colleagues -- deals with whether or not the letter and the spirit of the incorporation by reference provision has been complied with.

But trying to deal with all the possible permutations now, I think it's just going to lead to problems. It should just be a simple incorporation by reference to the extent there are issues that have to be dealt with after the fact.

MR. WALES: Your Honor, if I may please respond very briefly.

All we're asking for is a certification in good faith, and we've done that in a number of cases.

For example, we included the order, I believe, from *AmerisourceBergen* from after the 220

trial which had the language. Vice Chancellor Glasscock ordered -- he then subsequently issued an opinion fairly recently and discussed the incorporation by reference in *AmerisourceBergen* in denying the motion to dismiss.

Similarly, Vice Chancellor Slights in *Clovis* also dealt with this. As you read, there's a footnote -- I've been reading too much Delaware law, so it's either footnote 216 or 217 -- I sound like an academic -- that deals with this.

So it's just really like, "Okay, guys, we've now made our good faith and this is the universe." And I don't think there's anything wrong with that. And specifically to the language we showed in the *AmerisourceBergen*, you know, says -- obviously exempts the -- or has a carve-out for the stuff on the privilege log.

So we would ask that what the other judges have been ordering and what has been done is really what's fair. And we would expect, frankly, and we have no reason to doubt they wouldn't do a good faith search.

THE COURT: I'm comfortable doing that, having the certification. I think it ultimately

works out the way Mr. DiCamillo is suggesting. If anything, it just ensures that the burden is on him if he finds something to explain why it wasn't produced earlier and why their certification was, nevertheless, in good faith and consistent, which can happen. I mean, things can be found or overlooked. It's just that they then have to be explained with an understandable and credible explanation.

Let's proceed on that basis, and we can use those models that you've cited.

MR. WALES: Thank you, Your Honor.

THE COURT: Anything else that we need to cover?

MR. WALES: No, Your Honor. I just want to thank you for the opportunity to appear and spend our afternoon with you. Thank you.

THE COURT: Well, you're welcome.

Thank you, everyone, for showing up.

And, Mr. DiCamillo, you did anticipate correctly, I think we need to get some form of order that memorializes this so that, A, people can look to that in lieu of the transcript, and, B, obviously people have rights to go to higher powers than I if they feel aggrieved by this decision or any of the

rulings.

I think I've ruled against your side, Mr. DiCamillo, on purpose and then on a number of the requests, but there's a few issues where the plaintiffs should feel aggrieved as well. So we ought to get that into place so that people can do whatever they feel they need to do.

MR. DiCAMILLO: Thank you, Your Honor.

THE COURT: Everyone have a good day. I appreciate your time, and please continue to stay safe as we navigate these strange circumstances.

MR. DiCAMILLO: Thank you, Your Honor. You too.

MR. BERKOWITZ: Thank you, Your Honor.

(Proceedings concluded at 4:09 p.m.)

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CERTIFICATE

I, KAREN L. SIEDLECKI, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Merit Reporter, and Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 4 through 114 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings at pages 45-47, 62-65, 68-69, 76, 80, 86-88, 92, 95, 101-102, 105-106, 111-112, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 7th day of October, 2020.

/s/Karen L. Siedlecki

Karen L. Siedlecki
Official Court Reporter
Registered Merit Reporter
Certified Realtime Reporter